No. 91-111

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In The

Supreme Court of the United States

October Term, 1991

BERNARDSVILLE QUARRY, INC.,

Petitioner,

vs.

BOROUGH OF BERNARDSVILLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SCHENCK, PRICE, SMITH
& KING
Attorneys for Petitioner
10 Washington Street, CN-905
Morristown, New Jersey 07963-0905
(201) 539-1000

CLIFFORD W. STARRETT
Of Counsel and
On the Petition

M. SHEILAH O'HALLORAN
On the Petition

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QUESTIONS PRESENTED

1. May a United States District Court deprive a plaintiff of the right recognized in *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411 (1964), to have federal constitutional claims tried by a federal court by refusing to abstain, requiring plaintiff to submit its federal claims to a state court or be precluded by *res judicata* under the Full Faith and Credit Clause of the United States Constitution?

2. Where plaintiff's state court action was reached first for trial, the district court had in effect "abstained," and plaintiff had advised the district court and the state court that it was reserving its federal constitutional claims for trial in a federal court, were plaintiff's federal constitutional claims precluded by *res judicata*?

LIST OF PARTIES

The parties listed in the caption are the parties to the proceedings below. John Doe and Richard Roe were voluntarily dismissed prior to the entry of the summary judgment by the United States District Court for the District of New Jersey.

There are no parent companies or subsidiaries of petitioner Bernardsville Quarry, Inc.

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Bernardsville Quarry, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on March 8, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 929 F.2d 927 (3d Cir. 1991) and is reprinted in the

Appendix hereto, p. 1a, *infra.*

The memorandum decision of the United States District Court for the District of New Jersey (Brown, D.J.) has not been reported. It is reprinted in the Appendix hereto, p. 8a, *infra.*

STATEMENT OF JURISDICTION

The United States District Court for the District of New Jersey had jurisdiction pursuant to 28 U.S.C. § 1331(a) inasmuch as the complaint alleged a taking of the petitioner's property without due process and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The district court entered summary judgment dismissing the petitioner's complaint on August 14, 1990.

On petitioner's appeal to the Court of Appeals for the Third Circuit, the Third Circuit affirmed the decision of the district court on March 8, 1991. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES, COURT RULES AND ORDINANCE INVOLVED

a. 28 U.S.C. § 1331. *Federal question.*

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

b. 28 U.S.C. § 1738. *State and Territorial statutes and judicial proceedings; full faith and credit.*

> [. . .] Such Acts, records and judicial

proceedings [of any State, Territory or Possession of the United States] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

c. New Jersey Court Rule 4:27-1. *Joinder of Claims.*

(2) Mandatory Joinder. Each party to an action shall assert therein all claims which he may have against any other party thereto insofar as may be required by application of the entire controversy doctrine.

d. New Jersey Court Rule 4:5-1. *Pleadings Allowed; Notice of Other Actions.*

[. . .] Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any other party who should be joined in the action. [. . .]

e. Section 9(e) of Ordinance No. 770 of the Borough of Bernardsville entitled "An Ordinance to License and Regulate the Business of Quarrying in the Borough of Bernardsville and Providing

Penalties for the Violation Thereof:"

9. *Regulation of Operation.*

e. No quarrying shall be permitted which will reduce the quarried area below the lowest grade of adjoining properties, roads, or railroad line; nor shall any quarrying be permitted which will endanger the lateral support of abutting properties. [. . .]

STATEMENT OF THE CASE

Petitioner Bernardsville Quarry, Inc. ("BQI") is a New Jersey corporation which owns and operates the Bernardsville Quarry on a one hundred and ten acre tract in the Borough of Bernardsville. The property has been operated as a quarry for most of this century. BQI acquired title to the property for $3,825,000 on March 1, 1987 as the successful bidder at a sheriff's sale. The quarry property was particularly attractive to bidders because of its substantial reserves of high-quality basalt/trap rock, a material that meets the strictest of construction standards.

Following its purchase, BQI spent $1,500,000 to clean up demolition materials and other waste that had been dumped on the property under the prior ownership, and substantial amounts to repair and replace the on-site bituminous concrete plant and other plant and equipment. It simultaneously spent countless hours and thousands of dollars responding to the Borough's requests for information in connection with certificate of occupancy and permit applications.

On July 20, 1987, while BQI's applications were pending, the Borough Council adopted a Quarry License Ordinance (the "Ordinance") prohibiting quarrying below the lowest grade of

adjoining properties. The lowest grades of properties adjoining the Quarry are at elevations ranging from 500 feet to 350 feet. Because the property has been operated as a quarry continuously for most of this century, below-grade quarrying had occurred on the property for many years prior to enactment of the Ordinance. Specifically, a seventeen acre portion of the quarry had been excavated to elevation 225 feet prior to the acquisition by BQI. Substantially all of the remaining valuable basalt reserves lie below elevation 350. Thus, the effect of the Ordinance is to deprive BQI, by mere adoption of the Ordinance, of the 11,000,000 tons of basalt reserves lying below elevation 350 with an estimated value of $63,000,000.

BQI filed a quarry license application with the Borough on February 29, 1988, supported by voluminous expert reports. An asbestos clean-up plan and a reclamation plan were submitted. BQI's application was submitted with the expectation that the Borough would modify its prohibition on below-grade quarrying in view of the reclamation plan proposed. BQI received no response from the Borough on its application until April 11, 1988 when the application was denied.

On May 25, 1988, BQI instituted a civil action in lieu of prerogative writ in the Superior Court of New Jersey against the Borough challenging the validity of the Ordinance, the denial of a quarry license and a continuing certificate of occupancy. The complaint also alleged violations of petitioner's rights under the New Jersey Constitution and New Jersey law. With the exception of a § 1983 claim based on the state law claims, no claims of violations of federal law were asserted.

On May 28, 1988, BQI filed this civil action in the United States District Court limited solely to the claim that the Ordinance deprived it of its property without due process of law and without just compensation in violation of the Fifth and Fourteenth

Amendments. It also sought damages under 42 U.S.C. § 1983. No claims of violations of state law were asserted. The parties agreed that discovery in the state court action would also be deemed taken in the federal action.

On November 8, 1988, the Borough moved in the federal action for "abstention, stay or other appropriate relief and administrative dismissal of the matter pending the resolution of the parallel state action." In the course of oral argument, counsel for the Borough said:

> Accordingly, your Honor, it makes abundance (sic) sense in this particular case to try the case in the state court, and for the federal court to abstain. In the event that at some point in time it's determined that not all the federal questions have been adequately, or sufficiently resolved, in the state court action, then the federal court has the option at that point in time to turn around and say, okay, well, we'll pick up where the state court left off, for whatever it left out.

In colloquy with counsel, the district court judge indicated an inclination to stay the federal action for a limited period of time and then set up a status conference with the court. Counsel for BQI advised the court orally and in its brief in opposition to abstention that it reserved the federal constitutional issues for trial in the federal court. The district court then decided that rather than abstain, it would adjourn the pretrial until discovery was completed, with a status conference on April 17, 1989.

The trial of the state court action commenced on April 18, 1989, and continued for thirty-six days. As a result, the federal case was stayed pending resolution of the state case. The state court issued its decision on October 5, 1989. A motion to correct

the record and for reconsideration was denied. A final judgment was entered on January 8, 1990. On February 21, 1990, BQI filed a notice of appeal to the Appellate Division of the New Jersey Superior Court.

In connection with proceedings to determine the form of the final judgment in the state court action, the Borough included a provision stating that the depth limitation in the challenged Ordinance was not an unlawful deprivation of BQI's property without due process and without just compensation under the laws of both the State of New Jersey *and the United States.* Counsel for BQI objected on the ground that "plaintiff had studiously avoided asserting its rights under the United States Constitution in this litigation." The trial court agreed and struck the words "and the United States" from the final judgment. Thus, the state court was fully aware that the federal constitutional claims had been asserted in the United States District Court and had not been submitted to it for adjudication.

On March 12, 1990, the Borough moved to dismiss the complaint in the federal action. The Borough argued that all of BQI's claims had or should have been litigated in the state court action and were, therefore, barred by the entire controversy doctrine. The district court granted the motion to dismiss and filed an order on August 14, 1990. The Third Circuit affirmed the order of dismissal on March 8, 1991 based on an application of New Jersey's entire controversy doctrine.

REASONS FOR GRANTING THE WRIT

The district court and the Third Circuit have decided a federal question in a way that conflicts with applicable decisions of the Supreme Court and of the Third Circuit itself. BQI was led to believe that it had reserved its federal constitutional claims for trial in a federal court and, accordingly, did not plead them or

try them in the state court action only to be told at the conclusion of the state court action (a) that it could not return to the federal court and (b) that its federal constitutional claims were precluded by the entire controversy doctrine. Thus, BQI has been compelled, without its consent and through no fault of its own, to accept a state court's determination of its federal constitutional claims in violation of the principle of *England v. Louisiana State Bd. of Med. Examiners, supra,* 375 U.S. 411. This was accomplished, in the opinion of the Third Circuit, by the district court's decision not to abstain.

The Third Circuit's unduly narrow focus on the presence or absence of a formal abstention ignores the fact of the *de facto* abstention by the district court when it stayed the federal action pending completion of the parallel state action involving independent state claims. It also ignores the clear understanding of the parties and the courts as to the basis on which the respective actions were to proceed. BQI reasonably understood that the adjournment of the case management conference and the stay of the federal action constituted the required "abstention" which was a condition to its reservation of its federal constitutional claims. If a "formal" abstention were required, then the district court could and, according to the Third Circuit, did deprive BQI of its constitutional right to have its federal constitutional claims tried by a federal court — with no valid reason.

The United States Constitution provides that the judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish. Article III, § 1. The Congress has established the federal district courts and granted them jurisdiction over claims arising under the United States Constitution. 28 U.S.C. § 1331(a). Once BQI exercised the right granted by Congress to invoke federal jurisdiction, the federal court was bound to take the case and proceed to judgment. It could not abdicate its authority or duty

in favor of the state jurisdiction. *Cohens v. Commonwealth of Virginia,* 19 U.S. 264, 6 Wheat. 264 (1821); *Kline v. Burke Construction Co.,* 160 U.S. 226, 234 (1922).

Where concurrent jurisdiction exists, a plaintiff is free to bring suit in both the state and federal forums for the same cause of action. *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 642 (1977), *reh. denied,* 434 U.S. 881 (1977). As the Supreme Court noted in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970), a case in which parallel state and federal actions were pending:

> Although the federal court did have jurisdiction of the railroad's complaint based on federal law, the state court also had jurisdiction over the complaint based on state law and the union's asserted federal defense as well. While the railroad could probably have based its federal case on the pendent state law claims as well, it was free to refrain from doing so and leave the state law questions and the related issue concerning preclusion of the state remedies by federal law to the state courts. Conversely, although it could have tendered its federal claims to the state court, it was also free to restrict the state complaint to state grounds alone. In short the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts.

398 U.S. at 295-96 (citations omitted). Thus, as even the Third Circuit acknowledged below, the filing by BQI in both state and federal courts was both historically correct and authorized. Moreover, it was a practical necessity. Upon the denial of its quarry license application, BQI had forty-five days within which to

challenge the validity of the ordinance and the denial of its application. Clearly it had the right to challenge the validity of the ordinance in federal court on federal constitutional grounds. Its challenge to the denial of its license application and other conduct of the Borough officials was based on state law, however. Were BQI to have brought suit only in federal court, its state law claims would have been pendent to its federal claims. In the event the federal court were to dismiss the federal constitutional claims, BQI may have been deprived of the right to then pursue its state law claims in state court by the running of the forty-five day statute of limitations. Thus, BQI had no choice but to file parallel actions in state and federal court.

A corollary to the right simultaneously to pursue state and federal suits on the same cause of action is the right to reserve federal claims for adjudication in the federal court. This right, expressly confirmed by the Supreme Court in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, supra,* was established by the Supreme Court in *England.* In that case, plaintiffs who had been relegated to state court for determination of state law issues were recognized to have a right to return to federal court for a trial on their federal constitutional claims once the state action was completed.

In reaching its decision in *England,* this Court held that a litigant "who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can[not] be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." 375 U.S. at 415. Thus, where a party is simultaneously in state and federal court, he need not litigate his federal claims in state court. 375 U.S. at 420. Rather, he may reserve his federal claims for adjudication by a federal district court provided he makes it clear that "he is exposing his federal claims [in the state courts] only for the purpose of complying with Windsor, and

that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." 375 U.S. at 421. Only if a party "freely and without reservation" proceeds to litigate his federal claims in state court will he be precluded from litigating those claims in federal court. 375 U.S. at 420.

In addition, the Court pointed out that the doctrine of abstention does not contemplate the abdication of federal jurisdiction, but only the postponement of its exercise. The Court recognized that appeal from the state court to the Supreme Court is theoretically available by direct appeal, or by discretionary grant of certiorari, but:

> . . . is an inadequate substitute for the initial District Court determination — often by three judges, 28 U.S.C. § 2281 — to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims.

375 U.S. at 416. The *England* Court then ruled that when a reservation has been made, a litigant's right to return to federal court "will in all events be preserved." 375 U.S. at 421.

In affirming the district court's dismissal of the federal action, the Third Circuit found that BQI had sought similar relief in both actions. This finding is erroneous. BQI's state court complaint was carefully limited to the violation of BQI's rights under the state constitution. Only the fifth count of the complaint asserted that the denial of BQI's *quarry license application* violated BQI's

state and federal constitutional rights. By contrast, the federal court complaint was limited to alleging that the *limitation on the depth of excavation* deprived BQI of its property, without just compensation in violation of the Fifth and Fourteenth Amendments. A claim under 42 U.S.C. § 1983 was asserted based on the federal constitutional claim. Thus, the respective complaints were tailored to reserving the federal claims for federal court.

And both actions proceeded on the apparent understanding and agreement of the parties and the state and federal courts that the federal claims would be tried in federal court. On the Borough's motion for abstention, counsel for the Borough agreed that if all federal questions were not resolved in the state court action, BQI could return to federal court for adjudication of those claims. Likewise, on that same motion, BQI informed the district court that it was reserving its federal claims for adjudication by the district court. The district court declined to abstain at that point. Yet when the state court action was reached, the district court stayed the federal action — a *de facto* abstention — pending completion of the state case. The parties went to state court, therefore, fully expecting to be back in federal court at the conclusion of the state case to try the federal claims not asserted in the state court action.

Similarly, in the state court action, neither the parties nor the court understood that BQI's federal claims had been submitted for adjudication. Although the Third Circuit found that the state court had not been informed that BQI was reserving its federal claims for federal court, that is not the case. The state court had before it a complaint pleading only violations of state law. It had before it a certification by BQI's counsel pursuant to R. 4:5-1 that BQI had filed suit in the federal district court against the Borough arising out of the same controversy alleging a violation of its rights under the United States Constitution. Clearly, the state court appreciated the reservation of the federal rights for

it limited its final judgment to state law claims and struck from the Borough's proposed form of judgment any reference to an adjudication of federal claims.

Notwithstanding the foregoing, the Third Circuit held that *England* did not apply for two reasons: first, *England* requires an abstention, and there had been no abstention; and second, even if there had been an abstention, BQI did not properly reserve its federal claims. Instead, the Third Circuit found, "BQI unreservedly litigated its federal claims in state court and thereby elected to forego its right to return to federal court." Not only are these findings factually incorrect, they simply elevate form over substance.

This Court has never expressly ruled that abstention is a prerequisite to application of the *England* doctrine. And the Third Circuit itself has accepted that it is not. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990). *Cf.*, *Roy v. Jones*, 484 F.2d 96, 101-03 (3d Cir. 1978) (Aldisert, C.J. concurring). But even assuming that abstention is a prerequisite to application of the *England* doctrine, the actions of the district court in this case were tantamount to an abstention. While the district court did not enter an abstention order in January of 1989, it did, given its stated inclination to stay the case pending the outcome of the state action, put the federal case on a slower track. Then, only two and one-half months later, with no further proceedings having taken place in the federal action, it actually stayed the federal action when the state action was reached for trial. Inasmuch as a district court, upon abstention, stays the federal action and retains jurisdiction pending the proceedings in the state court, *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 512-13 (1972), the district court's April stay order was absolutely no different in effect than would have been an abstention order in January. *See Bradley v.*

Pittsburgh Bd. of Educ., supra, 913 F.2d at 1071-72. Surely, where important federal rights are concerned, a litigant's opportunity to pursue its claims in the forum it has chosen should hinge not on the words a district court uses but on the substance and effect of the orders it enters. Thus, the Third Circuit erred in ruling that there had been no district court action of a type to trigger application of *England*.

Moreover, the Third Circuit was simply wrong when it found that "BQI failed to inform the state court that it wished to pursue its federal claims in federal court." Under *England*, "an explicit reservation is not indispensable." *England v. Louisiana State Bd. of Med. Examiners, supra,* 395 U.S. at 421. Rather, what *England* requires is not that a party file something formal in the nature of a pleading with the state court but simply that the state court and the parties understand that the plaintiff's federal claims have not been submitted to the state court for adjudication. What better proof can there be that the state court understood BQI to have reserved its federal claims when, with knowledge of the pending federal action, the state court refused to rule on the federal claims and struck from its final judgment any reference to its having adjudicated the federal claims?

Rather than apply the principles of *England*, the district court and the Third Circuit chose to dispose of BQI's federal action on the basis of the Supreme Court's decision in *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (hereafter "*Migra*"). *Migra*, however, neither overruled *England* nor required dismissal of BQI's federal case. In fact, *Migra* clearly validates BQI's position that it is now entitled to pursue its federal constitutional claims in federal court, to wit:

> In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that the federal court abstains from passing on the

> federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, e.g., *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 11 L.Ed.2d 440, 84 S.Ct. 461 (1964).

465 U.S. at 85 n.7.

In *Migra,* the plaintiff first litigated her state claims of breach of contract and tortious interference to judgment in state court and voluntarily dismissed her "conspiracy" claims. She then filed suit in the federal court for violation of her federal constitutional rights under the First and Fourteenth Amendments. The Supreme Court in *Migra* did no more than hold that 28 U.S.C. § 1738 requires federal courts to give full faith and credit and the same claim preclusive effect to a state adjudication as would the courts of the state. It then examined Ohio case law to determine what constituted a "claim" under Ohio law, and found it could not determine what Ohio law had been applied by the district court and remanded for that purpose.

In the case *sub judice* the district court and Third Circuit followed the apparent direction of *Migra*, but failed to distinguish the disparate postures of the plaintiffs in the two cases. In *Migra*, the plaintiff, unlike BQI, litigated her case to conclusion in the state court before commencing her federal action. In that case, no reservation of federal questions was made and the plaintiff was properly deemed to have chosen the state forum over the federal forum.

The operative words in 28 U.S.C. § 1738 are that the judicial

proceedings shall have the same full faith and credit "as they have by law or usage in the courts of such state. [. . .]" The question projected is whether a plaintiff who had asserted its federal constitutional claims in a federal court would be precluded from asserting its state constitutional claims in New Jersey state court.

The entire controversy doctrine embodied in the New Jersey Court Rules requires that a person assert in one action all related claims against a particular adversary or be precluded from bringing a second action based on omitted claims against that party. *Falcone v. Middlesex County Med. Society,* 47 N.J. 92, 93 (1966); *William Blanchard Co. v. Beach Concrete Co.,* 150 N.J. Super. 277, 292-93 (App. Div.), *certif. denied,* 75 N.J. 528 (1977). The rule is designed to "eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties and promote fundamental fairness." *Aetna Ins. Co. v. Gilchrist Brothers, Inc.,* 85 N.J. 550, 556 (1981).

But the entire controversy doctrine has its limits. As noted in the *Restatement (Second) of Judgments* § 26 (1982):

> (1) When any of the following circumstances exists, the general rule [prohibiting the splitting of claims] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action, [. . .]

New Jersey, to whose law this Court must look, *Migra v. Warren City School Dist. Bd. of Educ., supra,* 465 U.S. at 84, specifically follows the *Restatement (Second) of Judgments. See, e.g., Brown v. Brown,* 208 N.J. Super. 372, 384 (App. Div. 1986); *Gareeb v. Weinstein,* 161 N.J. Super. 1, 10 (App. Div. 1978); *Devlin v. Johns-Manville Corp.,* 202 N.J. Super. 556, 569 (Law Div. 1985).

The Third Circuit itself, as it has in other cases, recognized below that *England* creates an exception to the entire controversy doctrine when it stated:

> Of course, if the district court had abstained, BQI could have avoided the effect of the Entire Controversy Doctrine by informing the state court of its intention to return to federal court to litigate its federal claims.

See also, Bradley v. Pittsburgh Bd. of Educ., supra, 913 F.2d at 1071; *Kovats v. Rutgers,* 749 F.2d 1041, 1048 (3d Cir. 1984). This is the exception embraced by subsection (1)(b) of Section 26 of the *Restatement.* As argued previously, BQI contends that it made the reservation of rights required by *England* and, therefore, its case fits squarely with the subsection (1)(b) exception.

BQI submits that not only does subsection (1)(b) except it from the operation of the entire controversy doctrine, subsection (1)(a) does as well. Courts applying New Jersey law have held that a party may waive the benefit of the entire controversy doctrine by acquiescing — either by word or conduct — to a plaintiff's splitting of its claims. *See, e.g., Bradley v. Pittsburgh Bd. of Educ., supra,* 913 F.2d at 1072-73; *Brown v. Brown, supra,* 208 N.J. Super. at 384. The Third Circuit in *Bradley* went so far as to suggest that state and federal tribunals may acquiesce in the claim splitting thereby preventing operation of the entire controversy doctrine. That is precisely what happened in this case.

To a person, everyone connected with these dual actions proceeded with the knowledge that BQI intended to try its state claims in state court and its federal claims in federal court. Although the Borough raised stock defenses in its answer in the federal action, including the pendency of the state action, it vigorously participated in both actions and made no motions to dismiss the federal action during the pendency of the state action. In fact, it was the Borough that moved the federal court to abstain and stay the federal action pending the outcome of the state action. In the context of that motion, counsel for the Borough expressly agreed that if the state court did not adequately address BQI's federal questions, the parties could come back to federal court to "pick up where the state court left off, for whatever it left out." If such words and actions do not constitute "acquiescence" within the meaning of the *Restatement*, nothing does.

It was not until the state action had been concluded and the form of final judgment submitted that the Borough asserted that BQI's federal claims had been decided by the state court. Its proposed form of judgment incorporated such a finding. When BQI objected to inclusion of its federal claims, the state court agreed that the federal claims had not been submitted to it for adjudication and refused to rule on the claims. Given the posture in which the state action was tried and adjudicated and the position which the Borough took in the federal action, BQI had every right to expect that it could return to federal court to try its federal claims. Thus, the Third Circuit erred in barring the action on the basis of New Jersey's entire controversy doctrine.

Likewise, the Third Circuit erred when it found that BQI had litigated its federal claims in state court, suggesting that, apart from the entire controversy doctrine, principles of *res judicata* would bar relitigation in federal court. Under the doctrine of *res judicata*, a party is barred from relitigating a cause of action that was previously fairly litigated and finally determined. *City of*

Plainfield v. Public Service Elec. & Gas Co., 82 N.J. 245, 257-59 (1980); *T.W. v. A.W.*, 224 N.J. Super. 675, 682 (App. Div. 1988) Application of the doctrine requires a final judgment by a court of competent jurisdiction, and identity of issues, parties, and cause of action. *City of Hackensack v. Winner,* 162 N.J. Super. 1, 27-28 (App. Div. 1978), *mod.*, 82 N.J. 1 (1980). The somewhat narrower doctrine of collateral estoppel bars relitigation of any issue of fact actually determined in a prior action. *State v. Gonzalez,* 75 N.J. 181, 186 (1977); *Warren Tp. v Suffness,* 225 N.J. Super. 399, 408 (App. Div.), *certif. denied,* 113 N.J. 640 (1988); *Charlie Brown of Chatham, Inc. v. Board of Adj. for Chatham Tp.*, 202 N.J. Super. 312, 327 (App. Div. 1985). But relitigation of issues is precluded in subsequent actions "only when they have been 'distinctly put in issue,' 'actually litigated' and 'directly determined' by a prior final judgment." *Matter of 1982 Final Reconciliation Adjustment for Jersey Shore Medical Ctr.*, 209 N.J. Super. 79, 92 (App. Div. 1986).

Neither doctrine applies to preclude relitigation of BQI's taking issue in federal court because the federal taking issue was not raised, litigated and adjudicated in state court nor was it the subject of a final judgment in state court. The Borough will no doubt argue that since the New Jersey and federal constitutional standards are similar BQI will only lose in federal court, having lost on the taking issue in state court. The state trial court's decision on the state taking issue is not determinative of BQI's federal taking issue, however, for as one district court judge has aptly noted:

> Defendants' argument that the state and federal questions are "mirrors," involving the same standards, does not deprive plaintiffs of their right to a federal forum. The fact that the state constitution may be construed in identical or similar ways does not transform federal

constitutional issues into state law issues.

Bally Mfg. Corp. v. Casino Control Comm'n of N.J., 534 F. Supp. 1213, 1217 (D.N.J. 1982). Indeed, the treatment of the taking issue in the federal courts is sufficiently different from the state treatment to require a federal court's adjudication of BQI's federal questions.

It is beyond question that a municipality, in the exercise of its police power, may adopt reasonable restrictions on the use of private property. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-26 (1978), *reh. denied*, 439 U.S. 883 (1978). Under New Jersey law, a presumption of reasonableness attends municipal regulation and a plaintiff must overcome the presumption by clear and compelling evidence demonstrating its unreasonableness. *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, 142 N.J. Super. 103, 116 (App. Div. 1976), *aff'd*, 74 N.J. 312 (1977). New Jersey courts have allowed this presumption to exert a confiscatory impact upon the rights of private property owners by, for example, denying a property owner a right of inverse condemnation unless deprived of "all or substantially all of the beneficial use of the totality of his property as the result of excessive police power regulation." *Orleans Builders & Developers v. Byrne*, 186 N.J. Super. 432, 446 (App. Div. 1982), *citing AMG Associates v. Springfield Tp.*, 65 N.J. 101 (1974); *Matter of Loveladies Harbor, Inc.*, 176 N.J. Super. 69 (App. Div. 1980), *certif. denied*, 85 N.J. 501 (1981); *American Dredging Co. v. State*, 169 N.J. Super. 18 (App. Div. 1979).

This presumption of reasonableness is certainly not foreign to federal jurisprudence. However, federal courts conduct a much more probing examination of the extent of the injury caused by municipal regulation. While virtually nothing short of confiscation will result in a finding of taking at the state level, federal courts

readily scrutinize the economic impact of the regulation on the claimant and the extent to which it has interfered with distinct investment-backed expectations. *See, e.g., MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 349 (1986), *reh. denied,* 478 U.S. 1035 (1986); *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211 (1986), *reh. denied,* 478 U.S. 1035 (1986); *Kirby Forest Indus. Inc. v. United States,* 467 U.S. 1, 14 (1984).

Thus, while the government may adopt regulations that adversely affect the value of property, *Penn Central Transp. Co. v. City of New York, supra,* 438 U.S. at 124, a taking for federal constitutional purposes occurs if an ordinance regulating the use that can be made of a particular property denies the owner economically viable use of his land. *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 295-96 (1981). *Cf. United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126-27 (1985). In such cases, the essential inquiry is how severe the impact of the regulation is on the property owner's parcel. *Penn Central Transp. Co. v. City of New York, supra,* 438 U.S. at 136. And in assessing the severity, the Supreme Court compares the value that has been taken from the property by virtue of the regulation with the value that remains in the property. *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

In this case, the state court found no taking of BQI's property despite specific findings (a) that BQI was, by virtue of the Ordinance, prohibited from removing 11,000,000 tons of basalt reserves and (b) that BQI had little likelihood of recovering its investment of $9,000,000. This finding was based, in large part, on the state court's ready acceptance of the "known hazards and dangers" inherent in quarrying referred to in *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren, supra,* 142 N.J. Super. 103 (one of New Jersey's only quarry cases), without application to the facts of the BQI case. This approach is clearly at odds

with the federal approach on mining issues.

Federal courts have found the prohibition of the mining of existing mineral reserves to be a taking requiring just compensation. *Whitney Benefits, Inc. v. United States,* 752 F.2d 1554 (Fed. Cir. 1985); *Skaw v. United States,* 740 F.2d 932 (Fed. Cir. 1984); *Yuba Goldfields, Inc. v. United States,* 723 F.2d 884 (Fed. Cir. 1983). They expressly or impliedly recognize the right to mineral reserves is a property right protected by the Fifth and Fourteenth Amendments and weigh the severity of the impact on the owner against the danger sought to be alleviated. This Court itself, in *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra,* 480 U.S. 470, although ruling that a requirement that an operator leave less than 2% of its coal in place to prevent subsidence did not result in a taking, acknowledged that its decision would have been different had the statute made it commercially impracticable for property owners to continue to mine on their properties. That holding was consistent with this Court's observation in *Goldblatt v. Hempstead, supra,* 369 U.S. 590, that a use restriction may constitute a taking if it has an unduly harsh impact on the owner's use of property. Although the mining restriction in *Goldblatt* was upheld, it was clear that the holding was premised on the Court's assumption that the ordinance did not prevent the owner's reasonable use of the property because the owner made no showing of an adverse effect on the value of the land.

As the *Dock Watch* case illustrates, New Jersey courts are quick to label quarrying a public nuisance and to find a public purpose in its elimination despite the economic devastation it visits on a quarry owner. This is not the case at the federal level where the consideration of the harshness of mining regulations pervades even those cases upholding mining regulations based on the specific facts presented. This consideration is poignantly revealed in Chief Justice Rehnquist's dissent in the *Keystone Bituminous Coal Ass'n* case in which three other Justices joined. Although recognizing

that the state was acting to promote a public purpose, Chief Justice Rehnquist argued that the existence of a public purpose was merely a necessary prerequisite to the state's exercise of its taking power but did not excuse the state from paying just compensation for destroying a property right in the public interest. 480 U.S. at 511. On the issue of public purpose, the Chief Justice found the majority had too blithely labeled the activity regulated a public nuisance and, in doing so, had created an exception to the taking guarantee far broader than the Court had ever recognized. 480 U.S. at 512. The Chief Justice would have found the statute to effect a taking because, he concluded:

> A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of "health, safety, and welfare."

480 U.S. at 512.

BQI has viable, important federal constitutional claims arising out of the Borough's regulations affecting the use of its property. It was entitled to have its federal taking claims tried by a federal court applying federal constitutional principles. It properly preserved this right by reserving the federal constitutional claims and not submitting them to the state court. The district court and the Third Circuit have deprived BQI of its right to have its federal constitutional claims adjudicated by a federal court.

CONCLUSION

The district court in effect abstained or stayed the federal action pending the trial of the state court action. BQI adequately reserved its rights to submit its federal constitutional claims to a federal court. The Third Circuit erred in finding that BQI would be precluded by New Jersey's entire controversy doctrine from asserting its federal constitutional claims since New Jersey courts would not have applied to BQI the bar of the entire controversy doctrine. Nor would BQI be precluded by *res judicata* since its federal constitutional claims were not raised, litigated and adjudicated in the state action. The order of the Third Circuit should be reversed and the case remanded for trial.

Respectfully submitted,

CLIFFORD W. STARRETT
SCHENCK, PRICE, SMITH
& KING
Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 8, 1991

Filed March 8, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-5783

BERNARDSVILLE QUARRY

Appellant

v.

BOROUGH OF BERNARDSVILLE

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 88-02427)

Submitted Under Third Circuit Rule 12(6)
February 22, 1991

Before: GREENBERG and COWEN,
Circuit Judges,
BUCKWALTER, *District Judge**

(Filed March 8, 1991)

Clifford W. Starrett
Schenck, Price, Smith & King
10 Washington Street
Morristown, New Jersey 07963

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*Honorable Ronald L. Buckwalter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

Counsel for Appellant

Richard P. Cushing
Gebhardt & Kiefer
21 Route 31
CN 4001
Clinton, New Jersey 08809

Dennis A. Cipriano
200 Executive Drive
West Orange, New Jersey 07052

Counsel for Appellee

OPINION OF THE COURT

COWEN, *Circuit Judge*.

This appeal concerns the propriety of the district court's dismissal of a complaint filed by Bernardsville Quarry, Inc. ("BQI"). BQI sued the Borough of Bernardsville (the "Borough") in federal court on May 31, 1988. In response to the Borough's motion, the district court dismissed BQI's federal action on August 13, 1990, because BQI had sued the Borough in a separate action based on the same underlying facts in the New Jersey Superior Court and lost. The district court concluded that under *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), it was required to accord the same preclusive effect to the state adjudication as would the courts of New Jersey, in accordance with the federal full faith and credit statute, 28 U.S.C. § 1738.

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Our jurisdiction is

predicated on 28 U.S.C. § 1291. Because we agree that the district court was required to accord the same preclusive effect to the state adjudication as would the courts of New Jersey, and that under New Jersey law, BQI would be precluded from relitigating its claims against the Borough, we will affirm the dismissal of BQI's complaint.

I.

In its federal complaint, BQI alleged that the Borough was depriving it of rights protected by the Fifth and Fourteenth Amendments in violation of the Constitution by refusing to grant BQI a Certificate of Occupancy and Use for a parcel of property which BQI hoped to exploit as a quarry to the greatest extent commercially practicable. BQI sought a declaratory judgment that a local ordinance which limited the use of BQI's quarry operations to a certain depth was unconstitutional. In addition, BQI sought damages under 42 U.S.C. § 1983.

BQI's federal complaint was the second prong of a two-prong attack against the Borough and the local ordinance which limited quarry operations to a specified depth. A few days before filing the federal suit, BQI filed a similar suit in the Superior Court of New Jersey. In state court, BQI sought relief similar to the relief requested in the federal suit based not only on federal and constitutional rights, but also on the added grounds that the restriction in quarry operations violated state law and a number of rights guaranteed by the state constitution.

In January 1989, the Borough filed a motion in the district court seeking an abstention, or in the alternative, a stay pending resolution of the state

action. The district court denied the motion and ordered the parties to proceed with discovery. When the state action went to trial on April 18, 1989, however, the district court stayed the federal action pending resolution of the state case. Final judgment in the state action was entered on January 8, 1990. The Superior Court found that the ordinance limiting the depth of quarry operations was a valid exercise of police power and that the Borough was not liable under section 1983 for damages.

After the Superior Court entered its January 8, 1990 order, the Borough moved to dismiss the federal complaint. The district court granted the motion on August 13, 1990. In an Opinion and Order of Dismissal, the district court concluded that under *Migra*, 465 U.S. 75, it was required to accord the same preclusive effect to the state adjudication as would the courts of New Jersey, in accordance with the federal full faith and credit statute, 28 U.S.C. § 1738, and that under New Jersey law, BQI would be precluded from relitigating its claims against the Borough. We agree.

III.

Initially, we must determine what legal precepts control the disposition of this case. BQI, on the one hand, contends that we are dealing in this case with an *England* reservation and that the district court erred by applying the principles of *Migra*. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) (any party to a litigation may reserve his right under abstention doctrine to return to federal court to litigate the federal issues where the federal court

has abstained pending resolution of a parallel state court action). The Borough, on the other hand, argues that *Migra* controls.

BQI's argument that this case involves an *England* reservation is flawed for two reasons. First, an *England* reservation only applies where the district court abstains. Here, the district court did not abstain. In fact, the district court expressly refused to abstain or stay its proceedings while the state proceedings moved forward on a parallel track. Second, a party is generally required to inform the *state* court that it intends to return to federal court for litigation of its federal claims, in the event that the state court rules against it. *England*, 375 U.S. 421-22. Here, BQI failed to inform the state court that it wished to pursue its federal claims in federal court.[1] These two factors in addition to the record as a whole lead us inextricably to the conclusion that BQI unreservedly litigated its federal claims in state court and thereby elected to forego its right to return to federal court, so that even if the *England* reservation rubric were applicable, BQI would not be entitled to return to federal court in this case. We will therefore apply the *Migra* analysis to determine whether the court was justified in dismissing BQI's complaint.

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1. BQI has quoted from the record of a proceeding before the district court to support its assertion that it took an *England* reservation. As we have said before, however, the party wishing to make an *England* reservation must make his intention known to the state court, not the federal court.

IV.

In *Migra*, 465 U.S. at 81, the Supreme Court stated that "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Id.* The only question then is whether another New Jersey court would have allowed BQI to raise its federal claim in a subsequent state court action. We conclude that it would not.

Pursuant to the Entire Controversy Doctrine under New Jersey law, a plaintiff is precluded from litigating in a subsequent proceeding both claims that it actually litigated and claims that it could have litigated in an earlier proceeding. *See Woodward-Clyde Consultants v. Chemical & Pollution Sciences, Inc.*, 105 N.J. 464, 472-73 (1987) (quoting *William Blanchard Co. v. Beach Concrete Co.*, 150 N.J. Super. 277, 292 (App. Div.), *cert. denied*, 75 N.J. 528 (1977)). To the extent then that BQI did not adjudicate every aspect of its federal claims, it is now barred from raising them again. Of course, if the district court had abstained, BQI could have avoided the effect of the Entire Controversy Doctrine by informing the state court of its intention to return to federal court to litigate its federal claims. But, that course was not open to BQI because the district court elected not to abstain. Accordingly, BQI had but one choice when the state action went to trial – which was to litigate every claim it had to the best of its ability – which, judging from the record, BQI did skillfully. Unfortunately for BQI, it did not prevail. BQI cannot avoid the consequences of its failure

to prevail in state court by taking a second bite of the apple now. We will therefore affirm the judgment of the district court dismissing this case in its entirety.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ENTERED AUGUST 14, 1990

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 88-2427 (GEB)

BERNARDSVILLE QUARRY, INC.,

Plaintiff,

vs.

BOROUGH OF BERNARDSVILLE, et. al.,

Defendants.

MEMORANDUM AND ORDER

BROWN, District Judge

This matter is before the Court on a motion by defendants to dismiss the complaint. Defendants contend that principles of claim preclusion require dismissal of the complaint because all issues were tried, or should have been tried, in a parallel state action. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984). Plaintiff, on the other hand, argues that it has properly reserved its federal claims for trial in this Court, citing *England v. Louisiana Medical Examiners*, 375 U.S. 411 (1964).

Appendix B

I. BACKGROUND

According to the complaint, plaintiff purchased a large tract of land in the Borough of Bernardsville on March 2, 1987. This land had allegedly been utilized since the early part of the century as a quarry and also housed concrete processing facilities. In 1963, the New Jersey Supreme Court issued a judgment declaring that the owners of the property "and their successors in ownership of the quarry . . . have a non-conforming general quarry use of the quarry area . . . and have the right to continue such non-conforming quarry . . . uses . . . without prohibition or restraint by municipal zoning ordinance . . . . *See* Complaint, ¶7 .

Following plaintiff's purchase of the property, defendants required plaintiff to apply for a Continued Certificate of Occupancy and Use (CCO) in accordance with local ordinance. Plaintiff filed an application for a CCO, but defendants denied the application on March 11, 1987, stating that "the only current use of which we are aware is a concrete plant." *Id.* ¶ 17. Although defendants eventually issued a CCO for the concrete processing facilities, they refused to issue one for the quarry operations.

On July 20, 1987, defendants adopted a Quarry License Ordinance (the "Ordinance") which, among other things, limited the depth of quarry operations in the Borough of Bernardsville. Plaintiff filed an application for a quarry license pursuant to this Ordinance, which application was denied by a resolution of the Borough (the "Resolution") on April 11, 1988.

On May 31, 1988, plaintiff filed a two-count complaint in this Court for alleged violations of the Taking Clause of the Fifth Amendment and 42 U.S.C. § 1983. More specifically, in Count One of the complaint, plaintiff seeks a declaratory judgment that

Appendix B

§ 9(e) of the Ordinance, which states that "[n]o quarrying shall be permitted which will reduce the quarried area below the lowest grade of adjoining properties," is invalid as an unconstitutional taking of property without just compensation. *See* Complaint, ¶22 . Plaintiff contends that this limitation conflicts with the 1963 judgment of the New Jersey Supreme Court. In Count Two of the complaint, plaintiff alleges that the denial of its application for a quarry license was the "culmination of a course of action consciously chosen" by defendants to deprive plaintiff of its constitutional rights in violation of 42 U.S.C. § 1983, and seeks damages under that statute.

A few days after plaintiff filed its federal complaint, it filed a similar complaint in state court. The second count of the state complaint is identical to Count One of the federal complaint in its factual allegations. However, where Count One seeks a declaration that § 9(e) of the Ordinance violates the Takings Clause of the Fifth Amendment, the second count of the state complaint seeks a judgment that § 9(e) "deprives the plaintiff of its property, including valuable stone reserves without due process and without just compensation in violation of the New Jersey Constitution." The fifth count of the state complaint is in all respects identical to Count Two of the federal complaint, seeking damages under 42 U.S.C. § 1983 based on defendant's actions in adopting the Resolution denying plaintiff's application for a quarry license.

The state complaint also goes further than its federal counterpart, asserting three additional counts entirely under state law. In the first count, plaintiff prays for an injunction compelling defendants to issue a CCO and a quarry license. In the third count, plaintiff seeks a declaratory judgment invalidating certain provisions of the Ordinance which were not directly challenged

in this Court. Finally, in the fourth count of the state complaint, plaintiff asks for damages and injunctive relief against defendants for allegedly perpetuating a private and public nuisance by preventing plaintiff from continuing quarry operations.

On January 1989, defendants filed a motion in this Court for abstention or, in the alternative, for a stay pending resolution of the state action. This Court denied the motion, and ordered the parties to continue with discovery, and to appear before the Court for a status conference on April 17, 1989. However, the status conference and all other proceedings in this Court were thereafter adjourned when the state case went to trial on April 18, 1989. Following a long trial, the state court issued a written opinion, including findings of fact, on October 6, 1989. *See* Certification of Richard P. Cushing, Exhibit C. A Final Judgment was entered on January 8, 1990. *Id.* Exhibit D. As to the second count of the state complaint, the court found that "the limitation on the depth of excavation in Section 9(e) of the Quarry License Ordinance is a valid exercise of the general police power and not an unlawful deprivation of the plaintiff's property without due process and without just compensation *under the laws of the State of New Jersey.*" *Id.* at 3 (emphasis added). As to the fifth count of the complaint, which asserted a federal claim under § 1983, the court entered judgment in favor of defendant Borough of Bernardsville "on the allegations set forth in the Fifth Count." *Id.* at 4.[1]

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1. Plaintiff met with only limited success on the other counts of the state complaint. On the first count, the state court found that the denial of plaintiff's application for a quarry license on April 11, 1988, was arbitrary and capricious, and it remanded the matter to the Borough Council for reconsideration, but it entered judgment for defendants on the other claims. On the third count, the court held invalid the provision of the Ordinance which limited the hours

(Cont'd)

Appendix B

II. DISCUSSION

The parties are now before this Court on a motion by defendants to dismiss the complaint. Defendants argue that *Migra v. Warren City School Dist. Bd. of Educ,* 465 U.S. 75 (1984). compels the dismissal of this complaint. The argument is a persuasive one. In *Migra,* the Supreme Court held that the full faith and credit statute, 28 U.S.C. § 1738, requires a federal court to accord the same claim preclusive effect to a state adjudication as would the courts of that state. *Id.* at 85. The plaintiff in *Migra* had brought suit in an Ohio state court solely on state causes of action. After winning a judgment, she then brought suit in federal court, alleging that the same facts constituted a violation of her federal constitutional rights and 42 U.S.C. § § 1983 and 1985. Because the law of Ohio would have barred the plaintiff from litigating in a second suit claims which she could have brought in the first, the Supreme Court held that 28 U.S.C. § 1738 prohibited the plaintiff from pursuing her second suit in a federal court.

Migra clearly precludes plaintiff from litigating its federal claims in this Court. Plaintiff brought two suits, nearly simultaneously, in state and federal court based on identical facts. Having proceeded to trial first in state court, and having lost there on its claim that § 9(e) of the Ordinance exacts a taking of property violative of the New Jersey Constitution, plaintiff now claims the right to return to this Court and assert that the same facts it presented to the state court entitle it to a different result under

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(Cont'd)
of quarry oprations, but it upheld the other provisions challenged by plaintiff. Finally, on the fourth count, the court entered judgment for defendants.

the federal Constitution.[2] But *Migra* held that a plaintiff should not get two bites at the same apple, even where that plaintiff is careful to sue on his federal claims only in federal court, and his state claims only in state court:

> [28 U.S.C. § 1738] embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious lititigation, and a desire to conserve judicial resources.

Migra, 465 U.S. at 84.

The only question is whether, under New Jersey law, plaintiff would be precluded from raising in a second state action the claims it has raised in this Court. The answer to this question is simple, for New Jersey's "Entire Controversy Doctrine" holds that "a party who has elected to hold back from the first proceeding a related component of the controversy be barred from thereafter raising it in a subsequent proceeding." *William Blanchard Co. v. Beach Concrete Co.*, 150 N.J. Super. 277, 292 (App. Div. 1977), *quoted in Woodward-Clyde Consultants v. Chemical and Pollution Sciences, Inc.*, 105 N.J. 464, 473 (1987). Therefore, because the courts of New Jersey would bar this action had it been brought

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2. Plaintiff certainly cannot argue that it is entitled to pursue its claim in Count Two of the federal complaint, which is based on 42 U.S.C. § 1983. That claim was clearly submitted to the state court as a § 1983 claim, and plaintiff's counsel concedes as much in a letter to the Court dated January 26, 1990, where he asserts that the "only" issue remaining for resolution by this Court is the takings claim in Count One of the federal complaint.

in state court, this Court is bound by *Migra* and § 1738 to do the same.

Plaintiff argues that it properly reserved the right to litigate its federal claims in this Court under *England v. Louisiana Medical Examiners,* 375 U.S. 411 (1964). *England* held that where a federal plaintiff is compelled to litigate his state claims in state court because of an abstention order under *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941), he can reserve the right to return to federal court for disposition of his federal constitution claims. Though *Migra* did nothing to affect the availability of an *England* reservation, *see* 465 U.S. at 85 n.7, *England* is applicable only where, unlike here, the federal court abstains under the *Pullman* doctrine. *See, e.g., Schuster v. Martin,* 861 F.2d 1369, 1374 (5th cir. 1988); *Tarpley v. Salerno,* 803 F.2d 57, 59-60 (2d Cir. 1986); *Griffin v. Rhode Island,* 760 F.2d 359, 360 (1st Cir. 1985).[3] If the law were otherwise, the *England* exception would swallow the *Migra* rule, for plaintiffs could then bring parallel suits in state and federal court free of the fear that state preclusion law would later bar their federal claims. Such a result clearly would conflict with *Migra,* and the Court therefore rejects the argument that *England* is available here to save plaintiff's federal suit. Defendants' motion to dismiss will be granted.

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3. The Court intimates no view as to whether an *England*-type reservation would be available in the absence of a *Pullman* abstention, but where the plaintiff is still "compelled, without his consent and through no fault of his own," 375 U.S. at 415, to litigate first in state court. *See Peduto v. City of North Wildwood,* 696 F.Supp. 1004 (D. N.J. 1988), *aff'd,* 878 F.2d 725 (3d Cir. 1989). Here, of course, plaintiff was not compelled to first obtain a determination from the state court on its state claims, but was free to bring all of its claims, state and federal, in this Court.

Appendix B

For the above reasons, it is on this 13th day of August, 1990,

ORDERED that defendants' motjon to dismiss be and is hereby granted.

GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX C — FINAL JUDGMENT OF SUPERIOR COURT OF NEW JERSEY LAW DIVISION DATED JANUARY 8, 1990

SCHENCK, PRICE, SMITH & KING
10 Washington Street
Morristown, New Jersey 07960
(201) 539-1000
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : SOMERSET COUNTY

DOCKET NO. W-27465-88 P.W.

BERNARDSVILLE QUARRY, INC., a New Jersey Corporation,

Plaintiff,

vs.

BOROUGH OF BERNARDSVILLE, a Municipal Corporation, et al.,

Defendant.

The above captioned matter having come on for trial before the Hon. Robert E. Guterl, J.S.C., and in the presence of Clifford W. Starrett, Esq., attorney for plaintiff, and Dennis Cipriano, Esq., attorney for the Borough of Bernardsville, and Richard P. Cushing, Esq., co-counsel for the Borough of Bernardsville, and attorney for John Doe, etc., and the Court having taken testimony from April 18, 1989 through June 20, 1989, and having considered the briefs and arguments of counsel and all of the issues raised in the Complaint and the Pretrial Order having been resolved or otherwise disposed of in accordance with the Court's written

Appendix C

Opinion of October 6, 1989 and this Final Judgment;

IT IS on this 8th day of January, 1990, ORDERED as follows:

FIRST COUNT OF COMPLAINT

(a) Anthony Ferrante & Sons, Inc., the former owner and operator of the quarry known and designated as Block 100, Lot 2 on the Official Tax Map of the Borough of Bernardsville ("Quarry") did not abandon the non-conforming use of the property for quarry purposes and that the plaintiff, Bernardsville Quarry, Inc., as the subsequent owner, had a right to continue the pre-existing, non-conforming use to the property and the stripping areas as more particularly set forth in a Final Judgment dated April 24, 1963 in the matter of *Somerset Crushed Stone, Inc. et al., Plaintiffs v. the Borough of Bernardsville*, Defendant Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-7854-58 ("1963 Judgment").

(b) Judgment is entered in favor of the defendant and against the plaintiff affirming the denial of the continuing Certificate of Occupancy to plaintiff by the Zoning Officer of the Borough on March 11, 1987;

(c) Judgment is entered in favor of the plaintiff, Bernardsville Quarry, Inc., and against the defendant, the Borough of Bernardsville, that the denial of the application for a quarry license on April 11, 1988 was arbitrary and capricious and the matter is remanded to the Borough Council for reconsideration as hereinafter provided.

(d) Judgment is entered in favor of defendant, Borough of

Bernardsville, on the remaining allegations of the First Count of the Complaint.

SECOND COUNT OF THE COMPLAINT

Judgment is entered in favor of defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., as follows:

(a) That the limitation on the depth of excavation in Section 9(e) of the Quarry License Ordinance is a valid exercise of the general police power and not an unlawful deprivation of the plaintiff's property without due process and without just compensation under the laws of the State of New Jersey.

THIRD COUNT OF THE COMPLAINT

(a) Judgment is entered in favor of plaintiff, Bernardsville Quarry, Inc., and against the defendant, Borough of Bernardsville, that the provisions of Section 9 of the Quarry Licensing Ordinance limiting the hours of quarry operation be and the same is hereby declared invalid.

(b) That Judgment be entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., adjudging and declaring that the remaining provisions of the Quarry Licensing Ordinance challenged in the Third Count of the Complaint be and the same are hereby declared valid and enforceable.

(c) Except as herein specifically provided in paragraph (a) above, Judgment is entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry,

Inc., on the Third Count of the Complaint.

FOURTH COUNT OF THE COMPLAINT

Judgment is hereby entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., on the allegations set forth in the Fourth Count.

FIFTH COUNT OF THE COMPLAINT

Judgment is hereby entered in favor of the defendant, Borough of Bernardsville, and against the plaintiff, Bernardsville Quarry, Inc., on the allegations set forth in the Fifth Count.

COUNTERCLAIM OF DEFENDANT
BOROUGH OF BERNARDSVILLE

Judgment is entered in favor of plaintiff, Bernardsville Quarry, Inc., and against the defendant, Borough of Bernardsville, on the Counterclaim.

REMAND TO THE BOROUGH COUNCIL
OF THE BOROUGH OF BERNARDSVILLE

Judgment is hereby entered that to the extent not otherwise resolved by this Final Judgment the plaintiff is given the option of having the matter remanded to the Borough Council of the Borough of Bernardsville for reconsideration of the application for a quarry license within 45 days of the Court's decision on October 6, 1989.

IT IS FURTHER ORDERED that upon reconsideration, the Borough Council shall impose reasonable conditions to include

compliance with all provisions of the Quarry Licensing Ordinance with the exception of those related to the hours of operation which have been deemed to be invalid. Bernardsville Quarry shall provide a revised Reclamation Plan in accordance with the provisions of the Quarry Licensing Ordinance within one hundred twenty (120) days of this decision. No quarrying, other than operations which are presently permitted, shall be commenced until the submission and approval of the revised Reclamation Plan.

PLAINTIFF'S ELECTION TO SEEK IMMEDIATE APPEAL

Plaintiff having been advised to its right to a remand in accordance with the prior Section of this Final Judgment and having advised the Court and defendant, Borough of Bernardsville, that it does not intend to apply to the Borough Council for reconsideration of its application for a Quarry License until the validity of the limitation on quarrying below elevation 350 feet above sea level has been finally determined, the Court does not retain jurisdiction as provided in the Court's Opinion dated October 6, 1989 and the within Judgment shall be deemed a Final Judgment for the purpose of appeal.

s/ Robert E. Guterl,
Robert E. Guterl, J.S.C.